SYARIKAT WEIFONG INDUSTRIES SDN BHD A

v.

KL TRADING & AGENCY HOUSE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
RAMLY ALI J
[CIVIL SUIT NO: D5-22-951-2005]
30 JANUARY 2007

CIVIL PROCEDURE: *Injunction - Damages - Undertaking as to damages - Liability of plaintiff - Whether undertaking would trigger upon dissolution of injunction - Enquiry as to damages - Whether could be heard before conclusion of trial proper* C

The plaintiff had filed a writ action against the defendants, and following that had applied for and obtained an *ex parte* injunction against the latter upon the usual undertaking as to damages. Subsequently, the *ex parte* injunction was dissolved, and the 2nd defendant, without waiting for the trial to be heard or concluded, moved the court for an enquiry as to damages. The plaintiff argued that the application for enquiry was premature, and that such application, rightly, ought to have been made after the conclusion of the trial proper – and not before that. Subscribing to the argument, the learned Senior Assistant Registrar dismissed the application. The 2nd defendant appealed and the issue that arose was whether, on the facts and in the circumstances, an enquiry as to damages herein could be heard at any stage after the injunction was dissolved, or only after the trial of the action. D E F

Held (allowing appeal and ordering for enquiry to proceed): G

(1) The undertaking given by the plaintiff stands by itself and not dependent on the outcome of the trial proper for the action. It is an undertaking on an interlocutory application for injunction. It is an absolute undertaking that the plaintiff will be liable for any damages which the defendant may have sustained, in case the court shall ultimately be of the opinion that the *ex parte* injunction order ought not to have been made. (para 14) H

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(2) The undertaking triggers once the court dissolves the *ex parte* injunction on the ground that the said order ought not to have been made in the first place. It follows, therefore, that the defendant is entitled to make an application for assessment of damages once the injunction (*ex parte* or otherwise) is dissolved. The application can be made before or at the time of the trial or within a reasonable time thereafter. (paras 14 & 17)

(2a) It follows further that there is nothing wrong in law for the 2nd defendant to initiate an application for enquiry as to damages suffered at this stage of the proceeding before trial. Nevertheless, the damages suffered must be confined to the time after the *ex parte* injunction was made until its dissolution. (para 21)

Case(s) referred to:

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC ***(foll)***

Newby v. Harrison [1861] 3 De GF & J 287 ***(refd)***

Novello v. James [1854] 5 De GM & G 876 ***(refd)***

Ross v. Buxton [1888] WN 55 ***(refd)***

Smith v. Day [1882] 21 Ch D 421 ***(foll)***

Ushers Brewery Ltd v. PS King & Co (Finance) Ltd [1971] 2 All ER 468 ***(refd)***

For the plaintiff - Pradeep Singh; M/s KS Ranjit Gill

For the 2nd defendant - Intan Azlina (P Aruna with her); M/s Kumar & Partners

Reported by WA Sharif

JUDGMENT

Ramly Ali J:

[1] Briefly, encl. 27 is the notice of assessment of damages dated 20 February 2006 filed pursuant to order of court dated 13 February 2006. Enclosure 27 seeks to inquire the damages sustained by the 2nd defendant as a result of the plaintiff's *ex parte* injunction order dated 6 July 2005, which was discharged by the order dated 13 February 2006.

[2] On the first hearing date for encl. 27 before the learned senior assistant registrar, the plaintiff raised a preliminary objection to the effect that encl. 27 should not be heard now but at the end of trial.

[3] On 10 October 2006, the learned senior assistant registrar accepted the plaintiff's preliminary objection and dismissed encl. 27 with costs. The 2nd defendant filed an appeal to the judge in chambers against the said decision.

[4] Only one issue is raised ie, should encl. 27 be enquired at this stage or after trial of this action.

Brief Facts

[5] By a writ of summons dated 4 July 2005, the plaintiff *(inter alia)* prays for the following orders:

(a) a declaration that the 1st defendant had in fact breached the supply agreement dated 13 January 2005;

(b) that the 1st and 2nd defendants be ordered to pay damages suffered by the plaintiff as a result of the breach;

(c) an injunction to restrain the 1st and 2nd defendants from accepting from the 3rd defendant a sum of RM970,000 under a Bank Guarantee No: 031BGA 0531009; and

(d) an injunction to restrain the 3rd defendant from releasing the said amount under the same bank guarantee to the 1st and 2nd defendant.

[6] At the same time *vide* encl. 3, the plaintiff filed for an *ex parte* injunction to restrain the 1st and 2nd defendants from accepting the same amount under the same bank guarantee and to restrain the 3rd defendant from releasing the said amount under the said bank guarantee to the 1st and 2nd defendants.

[7] On 6 July 2005, the court granted the plaintiff the said *ex parte* injunction and fixed 25 July 2005 for *inter partes* hearing.

[8] On 21 July 2005 the 2nd defendant filed an application (*vide* encl. 11) to set aside the *ex parte* order (dated 6 July 2005) and to assess damages suffered by the 2nd defendant as a result of the said *ex parte* order. Pending disposal of encl. 3 *(inter partes)* and encl. 11, the court granted the plaintiff an ad interim injunction.

[9] On 13 February 2006, the court gave order in terms of encl. 11 and expressly directed damages to be assessed by the registrar. In allowing encl. 11 in toto, the court on the merits decided that the *ex parte* injunction ought not to have been granted in the first instance. Furthermore, the court accepted the 2nd defendant's submissions that the *ex parte* injunction was obtained as a result of material non-disclosures by the plaintiff; damages is an adequate remedy for the plaintiff as the actionable wrong in this action is an alleged breach of agreement and there is no instances of fraud involving the 2nd defendant against the plaintiff.

The Law

[10] The law in respect of inquiry as to damages for injunction entered wrongfully is trite. The English case of *Ushers Brewery Ltd. v. P.S. King & Co. (Finance) Ltd.* [1971] 2 All ER 468 ("the Ushers Brewery Case") afforded the following accepted test when dealing with inquiries as to damages:

> It is my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until after the Plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.

[11] The *Ushers Brewery Case* also considered the underlying principle attached to an inquiry as to damages in relation to injunctions. It held that inquiries as to damages stem from the undertaking given by the plaintiff who seeks an injunction. Such an undertaking includes abiding by any order the court may make as to damages that may be occasioned to the defendant in the event the court finds that the injunction is wrongly granted.

[12] The *Usher Brewery Case* applied the case of *Newby v. Harrison* [1861] 3 De GF & J 287 and reproduced the following usurp in its judgment:

> The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of opinion that the order ought not to have been made.

[13] In determining the issue whether an inquiry as to damages should be made at the stage after the injunction was dissolved (before trial) or at the stage after trial of the action, the court must consider the undertaking as to damages provided by the plaintiff when he applies for the said injunction order.

[14] In the present case, the *ex parte* injunction dated 6 July 2005 was granted on an undertaking by the plaintiff to abide by any order the court may thereafter make as to any damages that may be occasioned to the defendants by the injunction. The undertaking stands by itself, not dependant on the outcome of the trial proper for the action. It is an undertaking on an interlocutory application for injunction. It is an absolute undertaking that the plaintiff will be liable for any damages which the defendants may have sustained, in case the court shall ultimately be of the opinion that the *ex parte* injunction order ought not to have been made. The undertaking triggers once the court dissolves the *ex parte* injunction on the ground that the said order ought not to have been made in the first place. The court may or is empowered to make an order that damages suffered by the defendant as a result of the said *ex parte* order, be assessed by the registrar, without having to wait for the conclusion of the trial.

[15] In *Ross v. Buxton* [1888] WN 55 (as cited in the *Ushers Brewery Case*), the plaintiff obtained an *ex parte* injunction on the usual undertaking as to damages, but an injunction was refused when the motion became effective. The defendant then moved for an enquiry as to damages which was ordered, before trial, on the ground that the *ex parte* injunction was improperly obtained. Again, in *Novello v. James* [1854] 5 De GM & G 876 (as cited in the *Ushers Brewery Case*) the injunction was dissolved and an enquiry ordered before trial.

[16] When is the most appropriate time for the defendant to make such an application for on enquiry to assess the damages suffered?

[17] The court is inclined to hold that the defendant is entitled to make such an application for assessment of damages once the injunction (be it *ex parte* or otherwise) is dissolved on the ground that the said injunction ought not to have been granted in the first place. It can be before or at the time or even after trial of the action, provided it is made within a reasonable time after the dissolution of the injunction.

[18] In *Smith v. Day* [1882] 21 Ch. D 421, Brett LJ said this in reference to an application for an enquiry as to damage:

> As regards the time when the application ought to be made, I do not think that we ought to lay down that it must be made at the time when the injunction is dissolved. I do not think that the applicant necessarily is to be allowed to postpone it till the trial, nor do I say that he never can successfully make the application after the trial. It think that he ought to make it within a reasonable time after the dissolution of the injunction, and that what is a reasonable time depends on the circumstances of the case.

[19] The court's jurisdiction to entertain such an application by the defendant to assess damages is founded on the undertaking made by the plaintiff in obtaining the *ex parte* injunction. It can be exercised immediately upon dissolution of the said injunction. The defendant may also choose to make such an application at a later date during or after trial of the action, provided there is no inordinate delay in making such an application after the dissolution of the injunction. This is in line with what Cotton LJ has said in *Smith v. Day (supra)*:

> As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking. It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause. No rule, however, has been laid down that it must be made at one or other of those times, and I do not say that the Court ought to lay down any express limit as to time, still think that a long delay might of itself be fatal to the application. In the present case I do not think that there has been such delay as that.

[20] Locally, the same principle was followed by Shankar J in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd. & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386, when His Lordship ruled as follows:

> As to damages Mr. Too urged and I agree that if the *ex parte* injunction was improperly obtained an inquiry as to damages could be immediately ordered without waiting for the trial. He cited *Injunctions*, 3rd Edition, by David Bean, page 69, *Ushers Brewery Ltd. v. PS King & Co. Ltd.* and *Ross v. Buxton. Harman Pictures NV v. Osborne & Ors* was also cited as an example of a non-resident Plaintiff being enquired to fortify his undertaking as to damages.

On 8 July 1987 I ordered that the *ex parte* injunction be dissolved. Because I was of the view that it was improperly obtained I also ordered that there be an inquiry as to damages. My intention was that these damages be assessed as soon as possible without waiting for the trial.

Conclusion

[21] On the above considerations and authorities, the court finds that in the circumstances of the present case, there is nothing wrong (in law) for the 2nd defendant to initiate application for enquiry as to damages suffered (*vide* encl. 27) at this stage of the proceeding before trial. The damages suffered confine only to the time after the *ex parte* injunction was made until it's dissolution. Any enquiry as to damages should only confine to the damages suffered during this period. The period is already ascertained when encl. 27 was made. Therefore, there should not be any obstacle for the enquiry to proceed now. The learned senior assistant registrar should not have dismissed the application.

[22] Therefore, the court allows the appeal with costs, overrules the preliminary objection made by the plaintiff and directs that the enquiry as to damages (*vide* encl. 27) to proceed forthwith.